

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

-v-

DOMINICK MEMOLI,

Defendant.

JED S. RAKOFF, U.S.D.J.

4-cr-140 (JSR)
16-cv-4097 (JSR)

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| ELECTRONICALLY FILED |
| DOC #: |
| DATE FILED: 8/15/17 |

ORDER

On July 11, 2017, Magistrate Judge Debra Freeman issued a Report and Recommendation ("Report") in the above-captioned matter recommending that Mr. Memoli's petition under 28 U.S.C. § 2255 to vacate and correct his sentence be granted. The Government filed an objection to the Report, dated July 25, 2017. Accordingly, the Court has considered the underlying motion and the Government's objections de novo.

Having done so, the Court finds itself in agreement with Magistrate Judge Freeman that Mr. Memoli's petition should be granted because one of the New York State convictions that had served as a predicate conviction for Mr. Memoli's enhanced federal sentence under the Armed Criminal Career Act of 1984 ("ACCA"), 18 U.S.C. § 924(e), was based on the statute's "residual clause," which the Supreme Court held to be unconstitutionally vague in Johnson v. United States, 135 S. Ct. 2551 (2015). This error was not harmless because one of Mr. Memoli's remaining predicate convictions, for four counts of burglary in the second degree, would itself have

qualified as a violent felony under ACCA only under the residual clause. Given these conclusions, the Court need not reach the question whether this conviction would qualify as one or four violent felonies.

Therefore, with the exception of the Report's conclusion as to whether the conviction for four counts of burglary should count as one or four predicate convictions, the Court hereby adopts Magistrate Judge Freeman's Report by reference.

A re-sentencing hearing will be held on September 29, 2017 at 2:00 p.m. The Government should take the steps necessary to produce the defendant for the hearing.

SO ORDERED.

Dated: New York, NY
August 14, 2017


JED S. RAKOFF, U.S.D.J.